

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.P., Appellant**

**and**

**U.S. POSTAL SERVICE, CHELSEA CARRIER  
ANNEX, Chelsea, MA, Employer**

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**Docket No. 20-1112  
Issued: August 24, 2021**

*Appearances:*

*John L. DeGeneres, Jr., Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 6, 2020 appellant, through counsel, filed a timely appeal from a March 9, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, counsel asserted that oral argument should be granted because appellant's compensation should not have been suspended for refusal to attend an impartial medical examination as a conflict did not exist in appellant's physical examination findings. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUE**

The issue is whether OWCP properly suspended appellant's entitlement to compensation benefits, pursuant to 5 U.S.C. § 8123(d), effective March 9, 2020, due to his failure to attend a scheduled medical examination.

### **FACTUAL HISTORY**

On May 15, 2017 appellant, then a 54-year-old supervisor, filed an occupational disease claim (Form CA-2) alleging that his job duties over the years caused or aggravated his right hip and right knee conditions. He noted that he first became aware of his conditions and realized their relation to his federal employment on April 7, 2017. OWCP accepted the claim for permanent aggravation of preexisting right hip osteoarthritis and ongoing aggravation of mild preexisting osteoarthritis of the right knee.

In an April 7, 2017 report, Dr. Byron V. Hartunian, a sports medicine specialist, noted appellant's history of the injury and medical treatment. He related that appellant had undergone a right total hip replacement on August 22, 2016 with a return to modified work in mid-October 2016 and full-work activities in early November 2016. Dr. Hartunian noted appellant's complaints at the right hip and right knee and had him complete an American Academy of Orthopaedic Surgeons (AAOS) Lower Limb Questionnaire. He also reported detailed physical examination findings. Dr. Hartunian noted that appellant's squatting was limited to 50 percent of normal due to restricted hip motion. Examination of the right hip demonstrated a nontender and well-healed anterior lateral incision from the total hip replacement surgery. Range of motion<sup>4</sup> (ROM) of the right hip demonstrated flexion 103 degrees, extension 10 degrees, internal rotation 14 degrees, external rotation 21 degrees, abduction 22 degrees, and adduction 24 degrees. Examination of the right knee revealed no palpable effusion or measurable swelling compared to the left knee. Neurovascular examination of the right lower extremity was normal. Dr. Hartunian opined that appellant reached maximum medical improvement (MMI) for his right hip in early November 2016, when he returned to full-duty work.

On February 12, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a January 15, 2018 report, Dr. Hartunian referred to his April 7, 2017 examination findings and opined that appellant had 41 percent permanent impairment of the right lower extremity, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> This rating was comprised of the combined values of 37 percent permanent impairment of appellant's right hip and 7 percent permanent impairment of the right knee under the diagnosis-based impairment (DBI) methodology. For the right hip, Dr. Hartunian opined that, under Table 16-4, page 515, of the A.M.A., *Guides*, appellant had class

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> All ROM measurements were performed three times in each direction using a goniometer.

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

3 default 37 percent impairment for total hip replacement with mild motion deficit. Regarding grade modifiers, he opined that the grade modifier for clinical studies (GMCS) was not applicable as x-rays were used in determining the class. The grade modifier for physical examination (GMPE) was also not applicable as there were no other pertinent physical examination findings. For the grade modifier for functional history (GMFH), Dr. Hartunian noted that the grade modifier was 0 for gait derangement, as appellant ambulated without a limp; however, the GMFH was 2 based on the AAOS Lower Limb Questionnaire. He indicated that on page 515 of the A.M.A., *Guides* it was noted that the higher grade was to be used in the impairment calculation, but he found the GMFH unreliable as it was 2 or more than the GMCS or GMPE. Dr. Hartunian found that the net adjustment formula did not apply and concluded that appellant had final class 3, grade 3 default 37 percent permanent impairment of the right hip. For the right knee, he found that, under Table 16-3, page 511 of the A.M.A., *Guides*, appellant had a class 1, grade C or seven percent permanent impairment for primary knee joint arthritis with 3 millimeter cartilage interval at the medial femorotibial joint. Dr. Hartunian opined that GMCS adjustment was not applicable as x-rays were used to determine the impairment class. He found GMPE 1 as there were minimal palpatory findings consistently documented without observed abnormalities. Dr. Hartunian excluded GMFH adjustment as it was on the same side as the hip. He found a net adjustment of zero under the net adjustment formula. Dr. Hartunian, thus, opined that appellant had class 1, grade C or seven percent lower extremity impairment of the right knee.

On February 16, 2018 OWCP referred the record to Dr. Jovito Estaris, a Board-certified occupational medicine specialist serving as OWCP's district medical adviser (DMA) for review.

In a report dated February 27, 2018, Dr. Estaris reviewed a statement of accepted facts (SOAF) and the medical record. Using Dr. Hartunian's April 7, 2017 examination findings, Dr. Estaris opined that appellant reached MMI on April 7, 2017. Also using Dr. Hartunian's April 7, 2017 examination findings, he calculated appellant's impairment utilizing both the ROM and DBI methodologies. Under the DBI methodology, Dr. Estaris found 31 percent right lower extremity impairment of the hip and seven percent right lower extremity impairment of the knee. Under the ROM methodology, he found 25 percent right lower extremity impairment of the hip and 0 percent right lower extremity impairment of the knee. Dr. Estaris opined that the DBI methodology yielded the highest right lower extremity impairment of 36 percent combined right lower extremity impairment.

Under the DBI methodology, Dr. Estaris concurred with Dr. Hartunian's 7 percent impairment rating for the right knee, but found that appellant had 31 percent impairment rating of the hip. Under Table 16-4, page 515, of the A.M.A., *Guides*, he found that appellant had class 3 grade C or default 37 percent impairment for total hip replacement with fair result, mild motion deficits. Under Table 16-6, page 516, of the A.M.A., *Guides*, Dr. Estaris assigned a GMFH of 2 based on AAOS, moderate deficit. Under Table 16-7, page 517, of the A.M.A., *Guides*, he assigned a GMPE of 1 for mild motion deficits. Dr. Estaris found that the GMCS was inapplicable as appellant's hip x-ray showed total hip replacement prosthesis in good position and the x-ray was used in proper placement in the regional grid. He applied the net adjustment formula and found a net adjustment of -3, which yielded a class 3, grade A or 31 percent impairment. Dr. Estaris explained that the discrepancy regarding the right hip impairment value was due to Dr. Hartunian's misunderstanding of the grade modifiers. He indicated that Dr. Hartunian erroneously found a GMPE of 0. Dr. Estaris indicated that, since there were mild motion deficits on physical examination of the right hip, it should be a GMPE of 1. He also indicated that the GMFH was 2 and should not have been excluded as it was not 2 grades higher as Dr. Hartunian had opined.

Dr. Estaris also indicated that the GMCS was not 0, but was inapplicable as it was used for proper placement in the DBI grid.

On March 27, 2018 OWCP requested clarification from Dr. Estaris as to the use of the GMPE as recent decisions from the Board, which specifically related that the GMPE should be excluded from the net adjustment formula when the nonkey factors were used for primary placement in the regional grid and appellant had no other objective deficits documented.

In an April 4, 2018 addendum report, Dr. Estaris explained that he assigned a GMPE of 1 due to mild motion deficits from Dr. Hartunian's examination. This was not a grade modifier 0 as indicated by Dr. Hartunian. Dr. Estaris also explained that, under Table 16-4, a class 3 for a partial or total hip replacement required a minimum of two criteria to be considered a fair result under that class and it was not accurate to assign that class based only on one of the criteria. He indicated that Dr. Hartunian did not use a GMFH since he found it to be two grades higher than the GMPE and he used the physical examination for placement in the DBI grid. However, Dr. Hartunian also incorrectly identified the GMPE as 0, which was not accurate. He explained that the GMPE was not 0, but 1 due to mild motion deficits. Since the GMPE was 1, the GMFH was not two grades greater than the GMPE. Using physical examination for placement in a DBI grid did not convert the grade modifier to 0; rather, it was then not used in the net adjustment process.

On July 31, 2018 OWCP forwarded Dr. Estaris' April 4, 2018 addendum report to Dr. Hartunian for review. In a September 9, 2018 letter, Dr. Hartunian advised that the only disagreement between Dr. Estaris and himself was the application of the functional history grade modifier, which they both agreed was 2. He advised that the A.M.A., *Guides* required that the GMFH be excluded as unreliable if it is two or more than either the GMCS or GMPE, which it was in this case.

On September 21, 2018 OWCP requested additional comments from the DMA based on Dr. Hartunian's September 9, 2018 letter. In an October 3, 2018 report, Dr. Estaris indicated that Dr. Hartunian's report did not change or modify his impairment rating calculation. He indicated that the GMPE and GMCS were not 0, but were both grade 1. Since the GMPE and GMCS were both 1, the GMFH was not 2 grades above the GMPE and GMCS. Pointing to Dr. Hartunian's examination findings, Dr. Estaris indicated that for GMPE, the examination showed limited ROM of the right hip, which is grade modifier 1 under Table 16-7 of the A.M.A., *Guides*. For the GMCS, he explained why there could be no grade modifier 0 under Table 16-8 as the x-ray of the prosthesis was a relevant finding. Dr. Estaris also explained that the A.M.A., *Guides* does not indicate that if the grade modifier was used for placement in the DBI grid, that the grade modifier was automatically 0. If a grade modifier was not available for adjustment of rating, it does not lose the assigned grade modifier value.

On February 11, 2019 OWCP again requested clarification from the DMA. It explained that the GMPE should be excluded because it was used for class placement. The GMCS was not used for class placement, therefore, the GMCS should be considered. The GMFH should be considered as there was only a difference of 1 between the GMCS and GMFH, and the nonapplicable GMPE did not necessitate excluding the GMFH. OWCP requested that the DMA provide a permanent impairment rating including GMCS.

In a February 2, 2019 amended report, the DMA indicated that Dr. Hartunian used GMPE and GMCS in the determination of class. Dr. Estaris indicated that as appellant's physical

examination showed mild motion deficits, it was used in the determination of class 3 under Table 16-4 and GMPE was excluded from the adjustment process. He indicated that the clinical study, which was the post operation x-ray of the right hip, showed good and stable position, and did not meet the criteria for class 3 impairment under Table 16-4. It would have resulted in a class 2 impairment and was, therefore, not used for class placement. Furthermore, the clinical study indicated that appellant's prosthesis was in good, stable position was a grade modifier of 1 since it was a mild pathology. Dr. Estaris explained that since the GMCS was 1, the GMFH could be used in the grading process since it was only one grade higher than the GMCS. He utilized the April 7, 2017 examination findings of Dr. Hartunian and again opined that appellant had 31 percent impairment for unilateral right hip arthritis and 7 percent impairment for unilateral arthritis right knee, for a combined 36 percent permanent impairment of the right lower extremity.

By decision dated March 28, 2019, OWCP granted appellant a schedule award for 36 percent permanent impairment of the right lower extremity. It accorded the weight of the medical evidence to the reports of Dr. Estaris serving as OWCP's district medical adviser (DMA), who utilized Dr. Hartunian's April 7, 2017 examination findings to arrive at his impairment rating. The award ran for 103.68 weeks, from April 7, 2017 through April 2, 2019.

On September 20, 2019 appellant, through counsel, requested reconsideration. In a September 19, 2019 brief, counsel took issue only with the use of grade modifiers, specifically the GMCS and GMFH, in determining the right hip impairment rating. He alleged that Dr. Estaris had improperly changed his analysis in his second report to find a GMCS of 1, which effectively reduced appellant's net adjustment rating. Counsel also alleged that the Dr. Estaris had not compared the GMFH to the GMPE and had he done so he would have had to exclude the GMFH from the net adjustment process as unreliable. He indicated that his allegations of error presented strictly legal questions of the proper application of the A.M.A., *Guides* to uncontested medical findings.

On November 8, 2019 OWCP declared a conflict in medical opinion between Dr. Hartunian and Dr. Estaris regarding the permanent impairment rating of appellant's right hip.

In a December 19, 2019 letter, mailed to appellant and counsel at their addresses of record, OWCP informed appellant that there was a conflict in the medical opinion evidence regarding the extent of the permanent impairment of his right lower extremity. It referred appellant to Dr. Robert Pennell, a Board-certified orthopedic surgeon, serving as an impartial medical specialist to evaluate appellant and to determine the permanent impairment of appellant's right lower extremity. The appointment with Dr. Pennell was scheduled for January 21, 2020 at 1:00 p.m. OWCP advised appellant that, if he failed to provide an acceptable reason for not appearing for the examination or obstructed the examination, his benefits would be suspended in accordance with section 8123(d) of FECA (5 U.S.C. § 8123(d)).

In a January 16, 2020 letter, counsel indicated that appellant would not be attending the scheduled impartial medical examination with Dr. Pennell on January 21, 2020. He contended that the declaration of a conflict in medical opinion was not necessary and was contrary to 5 U.S.C. § 8123(a), as Dr. Estaris was not an examining physician.

Appellant did not attend the January 21, 2020 appointment with Dr. Pennell.

On January 23, 2020 OWCP provided notice to appellant that it proposed to suspend his wage-loss compensation and medical benefits, pursuant to 5 U.S.C. § 8123(d), based upon his failure to attend the scheduled January 21, 2020 impartial medical examination with Dr. Pennell. It advised him that he had 14 days to provide a written explanation of his reasons, with substantive corroborating evidence, for failing to attend the scheduled examination. OWCP explained that an employee's right to compensation under FECA shall be suspended during the period of a refusal or obstruction of an examination by a physician. No response was received.

By decision dated March 9, 2020, OWCP finalized its proposed suspension of wage-loss compensation and medical benefits, effective that date. It noted that it had directed appellant to report for the examination scheduled on January 21, 2020 with Dr. Pennell, but that he had not attended the examination or shown good cause for his failure to attend the examination. OWCP indicated that appellant had failed to establish good cause for his failure to attend the scheduled examination and, therefore, pursuant to 5 U.S.C. § 8123(d), his compensation and medical benefits were suspended, effective March 9, 2020. It advised appellant that his benefits would be reinstated only after verification that he attended and fully cooperated with the directed examination.

### **LEGAL PRECEDENT**

Section 8123(d) of FECA authorizes OWCP to require an employee, who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.<sup>6</sup> The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP.<sup>7</sup> OWCP's regulations provide that a claimant must submit to an examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.<sup>8</sup> Section 8123(d) of FECA and OWCP regulations provide that, if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.<sup>9</sup> OWCP's procedures provide that, before OWCP may invoke these provisions, the employee is to be provided a period of 14 days within which to present in writing his or her reasons for the refusal or obstruction.<sup>10</sup> If good cause for the refusal or obstruction is not established, entitlement to compensation is suspended in accordance with section 8123(d) of FECA.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8123(d).

<sup>7</sup> *G.E.*, Docket No. 19-1949 (issued October 26, 2020); *L.B.*, Docket No. 17-1891 (issued December 11, 2018); *J.T.*, 59 ECAB 293 (2008).

<sup>8</sup> 20 C.F.R. § 10.320.

<sup>9</sup> *Supra* note 6 and *id.* at § 10.323, respectively; *see also G.E.*, *supra* note 7.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (September 2010).

<sup>11</sup> *Id.*

## ANALYSIS

The Board finds that OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective March 9, 2020, due to his failure to attend a scheduled medical examination.

The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP. The only limitation on OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.<sup>12</sup> The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues unless appellant can establish good cause for failing to report at the scheduled time.<sup>13</sup>

In a November 8, 2019 letter, OWCP found a conflict in medical opinion evidence between appellant's attending physician, Dr. Hartunian, and its DMA, Dr. Estaris, regarding the permanent impairment rating of appellant's right hip. Dr. Hartunian opined that appellant had 37 percent permanent impairment while Dr. Estaris opined that appellant had 31 percent permanent impairment. OWCP referred appellant for an impartial medical examination with Dr. Pennell and was advised of the need for the examination and the time and place for the scheduled appointment. He failed to attend the scheduled January 21, 2020 appointment. OWCP subsequently allowed appellant 14 days to provide reasons for failing to appear.

Counsel argued that there was no conflict in the physical examination findings regarding appellant's right hip and, therefore, no need for an impartial medical examination as the conflict in question only concerned a legal interpretation regarding how grade modifiers should be used in the net adjustment formula of the A.M.A., *Guides*. As noted, the only limitation on OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is one of reasonableness.<sup>14</sup> Appellant must provide a sufficient reason for failure to attend a scheduled medical examination.<sup>15</sup> The fact that counsel alleged that the difference in the impairment rating of appellant's right hip was due solely to a difference of legal interpretation of the A.M.A., *Guides* is not a sufficient reason for appellant's failure to attend the scheduled January 21, 2020 medical examination. OWCP properly referred appellant for an impartial medical examination to determine a final impairment rating of appellant's right hip as a conflict in medical opinion as to the extent of appellant's right hip impairment existed. Appellant has not otherwise explained why he did not attend the scheduled examination.

Thus, the Board finds that OWCP properly suspended appellant's entitlement to compensation in accordance with 5 U.S.C. § 8123(d) until the date on which he agrees to attend

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<sup>12</sup> *B.W.*, Docket No. 17-0847 (issued July 18, 2017); *Lynn C. Huber*, 54 ECAB 281 (2002).

<sup>13</sup> *G.E.*, *supra* note 7; *B.C.*, Docket No. 19-1058 (issued November 15, 2019); *T.W.*, Docket No. 16-1524 (issued February 6, 2017).

<sup>14</sup> *B.W.*, *supra* note 12; *T.W.*, Docket No. 16-1524 (issued February 6, 2017).

<sup>15</sup> *See D.K.*, Docket No. 18-0217 (issued June 27, 2018).

the examination. When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.<sup>16</sup>

**CONCLUSION**

The Board finds that OWCP properly suspended appellant's entitlement to compensation benefits pursuant to 5 U.S.C. § 8123(d), effective March 9, 2020, due to his failure to attend a scheduled medical examination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 9, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 24, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> *B.W.*, *supra* note 12; *C.S.*, Docket No. 11-1366 (issued December 12, 2011); *E.B.*, 59 ECAB 298 (2008).